UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH R. DE SOUSA, Appellant, v. AGENCY FOR INTERNATIONAL DEVELOPMENT, Agency, OFFICE OF PERSONNEL MANAGEMENT, Intervenor.	DOCKET NUMBER DC04328610530 DATE: OCT 26 1988

Hugh Hassan, American Federation of Government Employees, AFL-CIO, Washington, D.C., for the appellant.

Carl R. Soselee, Washington, D.C., for the agency.

Hugh Hewitt, Ann C. Wilson, James F. Hicks, Washington, D.C., for the intervenor.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The agency has petitioned for review of an initial decision issued on December 22, 1986, reversing the agency removal action for unacceptable performance. The Office of Personnel Management (OPM) has intervened pursuant to 5

U.S.C. § 7701(d)(1).[1] For the reasons set forth below, we GRANT the petition for review under 5 U.S.C. § 7701(e), REVERSE the administrative judge's finding that the agency committed an abuse of discretion in establishing the appellant's performance standards and deprived him of the opportunity to demonstrate acceptable performance because it failed to provide him with a new position description, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

BACKGROUND

The appellant was removed from his position as a Financial Analyst, GS-1160-.3, in the Office of Financial Management, Loan Management Division. Agency File, Tab 19. His removal was based on unacceptable performance in two critical elements of his performance plan. *Id.*

On June 28, 1985, the agency placed the appellant on a 90-day performance-improvement plan (PIP) based on a March 28, 1985 review finding the appellant's performance to be

[1] Based on our review of the submissions of the parties, we find that OPM has established good cause for its untimely filing. Although, under 5 C.F.R. § 1201.114(g), OPM was required to file its motion to intervene within 20 days of the date of service of the appellant's response to the agency's petition for review, the appellant did not serve his response on OPM. However, when OPM received a copy of the response on March 3, 1987, in response to its inquiry to the Office of the Clerk, it acted with due diligence and filed its intervention motion on March 9, 1987 -- within 21 days after the appellant's response was due (the 20th day fell on a Sunday). *See* 5 C.F.R. § 1201.114(g) (where no response to the petition for review is filed, OPM's motion will be considered timely if filed within 20 days of the date on which the response is due). Accordingly, we hereby GRANT OPM's motion to intervene under 5 U.S.C. §7701(d).

unsatisfactory and that he failed to make substantial progress since then. Agency File, Tab 7. In the March 28, 1985 review, the appellant's supervisor had evaluated the appellant's performance as to three of the four elements and standards relating to the agency's Housing Guaranty Program as either "unsatisfactory" or "marginally unsatisfactory," but noted that the appellant "no longer perform[ed] the functions envisaged by and identified in the original workplan, and accordingly [he had been] reassigned new duties effective February 4, 1985." *Id.* In accord with these new duties involving the monitoring and reporting of delinquent loan accounts and debt rescheduling, the March 28, 1985 review reflected that three new elements and standards had been added to the appellant's workplan. *Id.*

On September 16, 1985, the PIP was extended for an additional 60 days "to allow time (not more than two weeks) to complete a draft report on the system(s) [he had] developed on debt-rescheduling, and to provide time for completion of [his] performance plan because of a change in supervision." Agency File, Tab 8. At the conclusion of this extension, the agency developed a performance plan which restated the appellant's critical and non-critical elements and standards. Agency File, Tab 9. Subsequently, on January 15, 1986, the agency notified the appellant that it was extending the June 28, 1985 PIP for an additional 90 days and further defined the level of performance required to meet the "minimally satisfactory" level of the

performance plan. Agency File, Tab 10. At the conclusion of this period, the agency proposed the appellant's removal for unacceptable performance based on his failure to meet the "minimally satisfactory" level of the two critical elements of his performance plan. Agency File, Tab 14.

On appeal to the Board's Washington, D.C., Regional Office, the administrative judge reversed the agency action. She found that the harmful error standard did not apply to collective bargaining provisions regarding performance plans, and held that the agency had violated the substantive requirements of article 14, sections 1 and 2 of the union agreement. She therefore concluded that the agency had abused its discretion in establishing the performance standards and deprived the appellant of a reasonable opportunity to demonstrate acceptable performance. Based on these conclusions, the administrative judge declined to make further findings on the merits, but rejected the appellant's affirmative defenses of reprisal and discrimination based on national origin and religion.

In its petition for review, the agency contends that: (1) The administrative judge improperly reached the issue of whether the appellant's critical elements and standards were related to his position description after she ruled at the hearing that this issue was outside the scope of the appeal and excluded pertinent evidence; (2) the administrative judge erred in finding that the appellant's critical elements and standards did not relate to his position

description and constituted an abuse of discretion; (3) the administrative judge erred in not analyzing the alleged agency violations of the collective bargaining agreement under the harmful error standard; and (4) the administrative judge erred in finding that the appellant was deprived of a reasonable opportunity to demonstrate acceptable performance in his official position.

In its intervention brief, OPM states that the administrative judge erred in finding that the harmful error rule does not apply to violations of collective bargaining agreement provisions pertaining to an employee's elements and standards. OPM further argues that the Board's decisions in *Shuman v. Department of the Treasury*, 23 M.S.P.R. 620 (1984), and *Callaway v. Department of the Army*, 23 M.S.P.R. 592 (1984), upon which the administrative judge relied, concerned employee challenges to the objectivity and reasonableness of the performance standards themselves, rather than the failure to comply with specific provisions in a collective bargaining agreement relating to performance standards. Finally, it contends that the appellant was not deprived of a reasonable opportunity to demonstrate acceptable performance by the agency's failure to issue him a new position description since the appellant was not reassigned or detailed to another position, but was assigned collateral duties which he performed for several months before being placed on the PIP.

ANALYSIS

The administrative judge erred in finding that the harmful-error standard did not apply to violations of the provisions of the collective bargaining agreement.

In her initial decision, the administrative judge found that "the agency violated the union agreement by changing the appellant's duties without giving him a new position description" and that the agency therefore abused its discretion in establishing the appellant's performance standards and deprived him of a reasonable opportunity to demonstrate acceptable performance. I.D. at 6. In reversing the agency action based on its violation of the provisions of the union agreement, she further relied upon the Board's decision in *Giesler v. Department of Transportation*, 3 M.S.P.R. 277, 280 (1980), *aff'd sub nom. Giesler v. Merit Systems Protection Board*, 686 F.2d 844 (10th Cir. 1982), and declined to apply a harmful error analysis to the violations of these provisions. I.D. at 5. We find this constituted error.

In *Giesler*, 3 M.S.P.R. at 280, the Board stated that we "will treat provisions of a union agreement in the same manner as agency regulations." However, we also held in *Giesler* that the harmful-error standard is applicable to an agency's failure to follow such procedures under 5 U.S.C. § 7701(c)(2). *Id.* We have further found that the harmful-error standard is applicable to an employee's allegation that he was deprived of a reasonable opportunity to demonstrate acceptable performance by the agency's failure to follow its regulations, as well as to an allegation that

the agency has improperly modified its performance standards. *Cross v. Department of the Air Force*, 25 M.S.P.R. 353, 358-59 (1984), *aff'd*, 785 F.2d 320 (Fed. Cir. 1985); *Mouser v. Department of Health and Human Services*, 32 M.S.P.R. 543, 548 (1987). We find here that the harmful-error standard applies to allegations of agency error in applying collective bargaining agreements in performance actions brought under 5 U.S.C. Chapter 43, as with violations of agency rules and procedures, and that the administrative judge should have applied that standard.[2] *See Jimenez-Howe v. Department of Labor*, 35 M.S.P.R. 202, 208 & n.3 (1987).

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[2] We recognize that, in some contexts, the violation of agency regulations may not be amenable to the harmful error standard because an employee's substantive entitlements, such as that to an assignment to a specific position in the reduction-in-force context, may derive from the application of those regulations, as well as government-wide regulations promulgated by the Office of Personnel Management. *See, e.g., Bess v. Tennessee Valley Authority*, 19 M.S.P.R. 428, 429-30 (1984) (determination of separate competitive levels based on provisions of collective bargaining agreement was substantive right). However, we do not find that to be the case in performance actions brought under 5 U.S.C. Chapter 43.

We note, in any event, that the nature of the collective bargaining provisions here, requiring that an employee's official position description be changed to accurately reflect his assigned duties, was merely procedural since the agency's error in applying these provisions involved its failure to perform a mechanical process of preparing and issuing a formal document to the appellant, as found by the administrative judge. Thus, there was no basis for finding that the agency's failure to issue a new position description, without more, established that the agency had failed to comply with the substantive requirements of 5 U.S.C. § 4302(b) of establishing and communicating to the appellant reasonable, objective performance standards and of providing him with a reasonable opportunity to demonstrate acceptable performance.

The appellant did not establish harmful procedural error based on the agency's failure to change the appellant's position description.

In order to show harmful procedural error, an employee must prove that the agency committed an error in the application of its established procedures, and that there was an "appreciable probability that the error had a harmful effect upon the outcome before the agency." *Parker v. Defense Logistics Agency*, 1 M.S.P.R. 505, 513-14 (1980). *See also Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 123 (1983), *aff'd, 735 F.2d 488 (Fed. Cir. 1984), cert. denied sub nom. Schapansky v. Department of Transportation*, 469 U.S. 1018 (1984). The Board finds in this case that the appellant has not made such a showing as to the agency's failure to change his official position description to reflect his assigned duties. *See Wood v. Department of the Navy*, 27 M.S.P.R. 659, 663 (1985); *Cross*, 25 M.S.P.R. at 359.

In finding that the agency abused its discretion in not giving the appellant performance standards that were directly related to his prior duties in the Housing Guaranty Program, the administrative judge did not find, nor does the appellant contend, that the agency was precluded from assigning the appellant other duties than those set forth in his official position description. Thus, we find that in this respect this case is similar to *Mouser* at 5-6, in which we rejected the appellant's contention that the agency action should be reversed because it had improperly

"modified his performance plan, and evaluated his performance under the modified plan, without following the procedures established by the agency." There, we found that, even if the agency did not follow applicable agency procedures, such failure did not invalidate the modifications to the standards since "an agency may modify the quality and quantity of performance of its employees, as long as it does so according to a reasonable standard and makes the appellant aware of the modifications." *Id.* at 7.

Similarly, we find here that, since the agency was clearly entitled to assign the appellant to perform other duties, there was no basis for finding that the agency abused its discretion in setting forth reasonable standards for their performance in the appellant's work plan. It is undisputed that the agency communicated these new elements and standards to the appellant as part of the appellant's March 28, 1985 review, prior to its implementation of the June 28, 1985 PIP, and that they were restated in December of 1985 prior to the January 15, 1986 90-day extension, which the administrative judge found to serve as the opportunity-to-improve period. I.D. at 2. Moreover, the agency's failure to give the appellant a new position description did not deprive him of a reasonable evaluation period and of a reasonable opportunity to improve after his performance was rated as deficient under the new standards. *See Boggess v. Department of the Air Force*, 31 M.S.P.R. 461, 463-67 (1986).

In sum, since the appellant has not even alleged that the agency's failure to give him a new position description harmed him and we cannot discern any basis for imputing harm because of this error, we conclude that the record does not show harmful procedural error in this regard.

ORDER

Accordingly, since the administrative judge did not decide whether the agency otherwise established the appellant's unacceptable performance by substantial evidence under 5 U.S.C. § 7701(c)(1)(A) and whether it satisfied all of the substantive requirements of 5 U.S.C. § 4302(b), we REMAND this appeal for full adjudication of those issues consistent with this Opinion and Order.[3]

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

[3] In finding that the effect of relieving the appellant of "all duties and responsibilities of his position without giving him a new position description" was to deprive him of a reasonable opportunity to improve, despite the fact that the appellant was neither reassigned nor detailed officially to another position, the administrative judge alluded to the fact that the appellant, in effect, may have been reassigned or detailed to another position. I.D. at 6. Thus, under our decision in *Smith v. Department of the Navy*, 30 M.S.P.R. 253 (1986), the appellant may have been deprived of his substantive right to demonstrate acceptable performance in his Financial Analyst, GS-1160-13, position. However, this issue should have been analyzed separately from that of the agency's failure to follow the provisions of the union agreement, as we discuss above at 6-7, and the administrative judge did not decide whether there was a reassignment or a detail to another position. Moreover, our review of the record reveals that she may have unduly limited the evidence on this issue. Thus, the regional office shall provide the parties an opportunity to present additional evidence on remand, including a hearing if requested by the appellant, on these issues.